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No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PUBLIC JUSTICE, P.C. AND AARP FOUNDATION LITIGATION, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Petitioner Campbell-Ewald's attempt to use Rule 68 offers to moot class claims is at odds with basic notions of adequacy of representation and due process. According to Petitioner, class representatives are bound by Rule 68 offers (accepted or not), even where it effectively denies all other class members the ability to obtain any relief.

Amici are national legal advocacy groups that represent consumers and employees and advocate for robust enforcement of and remedies for violations of civil and statutory rights. Amici have a significant interest in protecting the rights of absent class members and submit this brief to explain why neither due process nor this Court's mootness jurisprudence permits Petitioner's preferred result.

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amici and their attorneys have paid for the filing and submission of this brief. Pursuant to Rule 37.3(a), all parties consented to the filing of this brief. A copy of that consent is on file with the Court.

preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions, and its experience is that the class action device is often the only meaningful way that individuals can vindicate important legal rights.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. Legal Counsel for the Elderly (LCE), an affiliate of AARP, is the leading provider of free legal services and advocacy for vulnerable older people in the District of Columbia. LCE's primary goals are to serve and empower thousands of low-income District seniors each year in those areas of law involving "basic human needs": income, housing, long-term care, personal autonomy, and consumer protection. AARP and LCE have a substantial interest in safeguarding due process protections and preserving access to remedies through class action representation.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a matter of first principles, a class representative must put absent class member interests before her own. Indeed, class actions exist to allow such a person to litigate the claims of absent class members efficiently (absent class members need not file, and the courts need not adjudicate, duplicative suits) and to ensure that substantive rights are protected even when individual damages are low. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) ("[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" (citations omitted)); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("[S]mall recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

Petitioner would stand this paradigm on its head. Under its view of Rule 68, defendants accused of wronging millions of people could avoid accountability by repeatedly picking off the few willing to step forward. *But see Chapman v. First Index, Inc.*, No. 14-2773, ___ F. 3d ___, 2015 WL 4652878, at *1 (7th Cir. Aug. 6, 2015) (Easterbrook, J.) (holding that Rule 68 offers do *not* moot a

pending class action).[2] This would create manifest inefficiency, *contra, e.g.*, Fed. R. Civ. P 1, and effectively deprive absent class members of their ability to rely on the class mechanism to vindicate their substantive rights. There simply is no basis in law or logic for reading Rule 68 to effectively abrogate so much of Rule 23. *See, e.g., Silva v. City of Madison*, 69 F.3d 1368, 1371 (7th Cir. 1995) ("[A] single rule cannot be read in a vacuum. [It] must be read in light of the structure of the entire Rules of Civil Procedure.").

But the central problem with Petitioner's argument is not that it is illogical (though it is), nor that it is impossible to reconcile with the policies underlying Rule 23 (although it is that, too): due process simply does not allow an unaccepted offer of judgment to moot class claims. The strong due process rights of absent class members, repeatedly emphasized by this Court, cannot be traded for the interest of an individual representative plaintiff. *See, e.g., Amchem*, 521 U.S. at 625, 627.

Petitioner, however, would have this Court hold that a proposed class representative is

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[2] At least five other circuits are in accord with Judge Easterbrook's view. *See Jeffrey M. Stein, D.D.S., M.S.D., P.A. v. Buccaneers L.P.*, 772 F.3d 698 (11th Cir. 2014); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

effectively required to accept a Rule 68 offer of judgment, enriching the proposed representative while leaving absent class members without adequate representation. Allowing defendants to use Rule 68 offers (particularly unaccepted ones) to moot class representatives' claims creates an irreconcilable conflict of interest between representative plaintiffs and the classes they purport to represent. Neither Rule 23 nor due process permits a procedural cost shifting rule to be distorted into a substantive rule that unilaterally deprives a federal court of jurisdiction over a case filed as a class action. This is particularly so given a class representative's special relationship with other class members, which stands at the heart of the class action mechanism: the proposed class representative is required to stand in the shoes of—and protect the rights of—the absent class.

Petitioner defends its illogical approach by arguing that it is compelled by this Court's mootness jurisprudence, but nothing in this Court's prior rulings permit—much less demand—such a result. To the contrary, the Court has long recognized the "flexible character of the Art. III mootness doctrine," *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980) (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961)), and has afforded the due process protections embedded in Rule 23 "unique significance" when applying those principals, *e.g. Sosna v. Iowa*, 419 U.S. 393, 398 (1975). This Court has thus recognized that the class plaintiff's interests are not mooted even in circumstances where an individual plaintiff's claims might be. *See Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 343-44 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *United Airlines, Inc. v.*

MacDonald, 432 U.S. 385, 393-95 (1977). Those cases apply with full force when a defendant tenders a Rule 68 offer prior to class certification: a representative plaintiff's ability and obligation to represent the class, and legal interest in doing so, should not be subject to unilateral destruction by a defendant's unaccepted offer of judgment.[3]

At bottom, Petitioner seeks to read Rule 68 in a manner that would severely limit the very due process rights of absent class members this Court has taken great care to protect. Amici thus respectfully urge this Court to reject Petitioner's arguments and affirm the decision of the Court of Appeals.

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[3] In Petitioner's view, a representative plaintiff's claims are mooted by any Rule 68 offer prior to class certification. Yet the due process rights of absent class members prevent the same individual from accepting that very same offer once a class has been certified. In other words, Petitioner would give defendants the power to render a proposed class representative inadequate prior to class certification simply by making a Rule 68 offer that an adequate class representative could never accept following class certification. This cannot be the law.

ARGUMENT

I. DUE PROCESS REQUIRES A CLASS ACTION PLAINTIFF TO PROVE THAT SHE WILL REPRESENT THE CLASS ADEQUATELY BY HOLDING CLASS INTERESTS ABOVE HER OWN.

This Court has long upheld the essential safeguards that operate to protect absent class members' due process rights. Of particular relevance, "the Due Process Clause requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). An absent party is thus bound to judgment only "where they are in fact adequately represented by parties who are present." *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).[4] Rule 23 safeguards these fundamental constitutional principles in part by requiring a class representative to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

The core purpose of the Rule 23(a)(4) inquiry is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625, 627. In other words, the inquiry ensures that "named plaintiffs operate[ ]

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[4] Petitioner and its Amici agree with this proposition, *see, e.g.*, Brief of the Chamber of Commerce of the United States of America and Business Roundtable as *Amici Curiae* in Support of Petitioner (July 23, 2015) at 13-17 (arguing that adequacy of representation is rooted in due process), but misconstrue its import.

under a proper understanding of their representational responsibilities" to the class. *Amchem*, 521 U.S. at 625, 627. A class representative must "possess the same interest" as the absent class members, or he is inadequate to represent them. *Id.* (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

The risk of a conflict between a proposed class representative and members of the class is particularly acute once offers for settlement have been made. This is so because a class representative whose "critical goal is generous immediate payments" has a conflict that "tugs against" the interest of other class members in a "fund for the future." *Amchem*, 521 U.S. at 595; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999) ("The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants.").[5]

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[5] *See also Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 (2d Cir. 2001) (permitting a collateral attack on class settlement of Agent Orange litigation on grounds of inadequate representation), *aff'd in relevant part*, 539 U.S. 111 (2003); *cf.* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 Sup. Ct. Rev. 183, 208 (2008) (noting the difficulty in securing class action settlement of mass tort claims "absent some extraordinary willingness of a settling defendant to allow some form of future claims to return to the tort system," due in large part to the

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In sum, this Court consistently has made clear that adequacy of the class representative—an essential element of due process—hinges on the named plaintiff's ability to act in the best interests of the class. As explained below, it greatly impinges on the constitutional rights of proposed class members to allow a defendant to remove a proposed class representative unilaterally based on sharp procedural maneuvering. *Contra* 28 U.S.C. § 2072 (b) ("[The Federal Rules] shall not abridge, enlarge or modify any substantive right.").

II. CONSTRUING UNACCEPTED RULE 68 OFFERS TO MOOT A REPRESENTATIVE PLAINTIFF'S CLAIM WOULD CREATE AN INHERENT CONFLICT OF INTEREST BETWEEN CLASS REPRENTATIVES AND ABSENT CLASS MEMBERS THAT VIOLATES DUE PROCESS.

Petitioner and its amici contend that an unaccepted Rule 68 offer of complete relief moots any claims asserted by a proposed representative plaintiff as well as the class claims asserted in her

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potential conflicts between class representatives and the class as identified in *Amchem*); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 832 (1995) ("[S]ide settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class.").

complaint.[6] This cannot be reconciled with the basic principles underlying adequacy of representation in the class action context, and it ignores the special status of a proposed representative plaintiff. That status is at the core of the class action mechanism: the proposed class representative represents the interests of many others who were affected by the same illegal conduct and protects the rights of those absent class members. The certification prerequisites of Rule 23(a), particularly the requirement for adequacy of representation in Rule 23(a)(4), all strive to ensure that the representative plaintiff(s) can fulfill this role.

All class representatives must be, among other things, loyal to absent class members: they are not to file potential class actions solely to make money for themselves, instead they must agree to stand for everyone else in the class. Put another way, a representative class member's interest *as a representative class member* is separate from her personal and individual economic interest: he undertakes a duty to represent the interests of the class. *See, e.g., Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) (noting the fiduciary duty of absent class members); *Prater v. Medicredit, Inc.*, 301 F.R.D. 398, 401 (E.D. Mo.

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[6] At a minimum, the court retains jurisdiction to determine whether the offer provides complete relief and to enter a judgment. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1019, 185 L. Ed. 2d 1 (2013) ("As 'long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" (citation omitted)).

2014) ("In a class action complaint, the named plaintiff, as the putative class representative, has a special role of assuming responsibility for the entire class of persons." (quoting *Johnson v. U.S. Bank Nat'l Ass'n*, 276 F.R.D. 330, 332 (D. Minn. 2011))).

The "divide and conquer" argument—that Rule 68 offers can be used, in effect, to force otherwise adequate class representatives to abandon the class—flies in the face of this fundamental obligation. In Petitioner's view, even if a class representative wants to do the right thing—reject an individual payday and stand for the entire class—Rule 68 strips her of that power, and the court *must* dismiss the whole case for lack of subject matter jurisdiction. It is not hard to understand why class action defendants would seek this advantage, but it cannot be reconciled with the adequacy of representation requirement underlying class actions. *See Silva*, 69 F.3d at 1371 ("[A] single rule cannot be read in a vacuum. . [It] must be read in light of the structure of the entire Rules of Civil Procedure.").

III. PETITIONER'S APPROACH LEADS TO LOGICALLY INCOHERENT RESULTS AND GIVES DEFENDANTS IMPROPER CONTROL OVER CLASS REPRESENTATION.

Petitioner's interpretation of Rule 68 should also be rejected because it leads to a logically incoherent result whereby class representatives are subject to diametrically opposed duties depending on the timing of a Rule 68 offer. It also gives defendants the ability to pick and choose who represents the class—a truly perverse outcome.

A. Petitioner's interpretation of Rule 68 is incoherent.

It is well established that due process rights of absent class members are threatened by *post-certification* settlements that disproportionately favor class representatives over other members of the class. *See, e.g.*, Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 15:27 (4th Ed. 2002) ("Normally, unless a class representative has unique claims apart from those common with the class, the named plaintiff may not obtain a preferential allocation from a lump sum class recovery but must be treated the same as all other absent members of the class."). Once a class has been certified, a class representative may not—consistent with adequacy of representation—accept a settlement offer that affords him or her preferential treatment. *See* Rule 23(e).[7]

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[7] A representative plaintiff who seeks a result beyond what he could achieve as a class member is in conflict with the class, jeopardizing the adequacy of representation. *See Franks v. Kroger Co.*, 649 F.2d 1216, 1226 (6th Cir. 1981), *reh'g*, 670 F.2d 71 (6th Cir. 1982) ("It is clear to this court that the named plaintiffs inadequately represented the interests of the other class members in negotiating the proposed settlement."); *Hooks v. General Finance Corp.*, 652 F.2d 651 (6th Cir. 1981) (per curiam) (denying class certification where proposed class representative "insisted on the maximum statutory recovery for himself rather than a pro rata share of any recovery to which the class might be entitled").

Under Petitioner's proposal, however, that very same class representative is effectively forced to accept that very same settlement offer *before* a class has been certified—even though accepting that offer ostensibly moots out the class claims entirely, leaving absent class members without any recovery at all. In Petitioner's view, a proposed class representative is beholden to a pre-certification offer that she would be duty-bound to reject post-certification.[8] It is impossible to see how this scheme comports with logic or due process.

Petitioner's suggestion that an otherwise adequate representative who "has secured complete relief occupies a fundamentally different position than putative class members," Pet. Br. at 34, misses the point. The class representative, even before certification, must not elevate her own interests above those of the class. But the inescapable import of Petitioner's view is that if the *defendant* offers the representative plaintiff a position better than any other class member, she is not only powerless to refuse it, but also instantly becomes an inadequate class representative *whether she would like to refuse it or not*. In other words, the class representative

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[8] It also encourages gamesmanship by both defendants and class action plaintiffs. *See Jeffrey M. Stein, D.D.S., M.S.D., P.A. v. Buccaneers L.P.*, 772 F.3d 698, 708 (11th Cir. 2014) (noting that treating claims differently depending on whether the Rule 68 offer is made prior to or after the class certification motion is filed "produce[s] unnecessary and premature certification motions in some cases and unnecessary gamesmanship in others.").

who would (and must) resist "opportunities for the fraudulent and collusive sacrifice of the rights of absent parties," *Hansberry*, 311 U.S. at 45, becomes incapable of representing the class because the mere offer of relief under Petitioner's interpretation of Rule 68 escalates that individual's interests above those of the class. This result would frustrate the adequacy of representation requirement that is essential to protecting the due process rights of absent class members.

B. Petitioner's interpretation of Rule 68 would allow a defendant to choose its preferred class representative.

Permitting defendants to moot class claims unilaterally through a Rule 68 offer also gives defendants an improper control over the representation of the class, both in terms of the class representative and their counsel. In particular Petitioner's approach creates an incentive for defendants to make Rule 68 offers to those plaintiffs and their counsel whom they perceive as the strongest adversaries (until a suitably agreeable plaintiff or counsel comes along to settle the case or face a perceived disadvantage).[9] Suggestions by

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[9] Professor Roger C. Cramton articulated the problem in the context of post-certification aggregate settlements:

> It is unlikely that competent, diligent, and loyal representation of the entire class will result when defendants essentially select one or several

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Petitioner's Amici that this problem can be avoided if plaintiff's counsel simply corrals as many potential plaintiffs as possible does nothing to address this issue: a defendant could simply moot the claim of every proposed representative who was likely to be a particularly strong witness at trial.

One final point. The claim that offers of full relief will cause a "feeding frenzy of claims" and "a defendant confronted with so many claims may conclude that it would *benefit* from class certification," Brief of Chamber of Commerce at 22, should not be taken seriously. This is so because "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (emphasis in original).

* * *

Petitioner's proposal dangerously undermines the due process rights of absent class members and allows class action defendants to control class

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> plaintiffs' lawyers to represent the class by expressing a willingness to negotiate with these lawyers. An adversary-system rests upon the premise that lawyers for a party are selected by that party, not by the opposing party.

Cramton, *Individualized Justice*, 80 Cornell L. Rev. at 826-27.

representation. Neither Rule 23 nor due process permits this.

IV. PETITIONER'S APPROACH IS CONTRARY TO THIS COURT'S FLEXIBLE MOOTNESS JURISPRUDENCE, WHICH INCORPORATES THE DUE PROCESS REQUIREMENTS OF ADEQUATE REPRESENTATION.

Contrary to Petitioner's contention, the due process protections essential to the class action process readily coexist with the Court's well-established jurisprudence regarding mootness. This Court has previously noted the "flexible character of the Art. III mootness doctrine" in the class action context, observing that mootness is "not a legal concept with a fixed content or susceptible of scientific verification." *Geraghty*, 445 U.S. at 400 (quoting *Poe v. Ullman*, 367 U.S. at 508 (plurality opinion)). Indeed, even setting aside that an unaccepted offer under Rule 68 should not moot an *individual* claim, *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005), it would not matter if it did.[10] This is so because the Court repeatedly

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[10] While there is a circuit split on this issue, Amici respectfully suggest that the better reasoned opinions explain that Rule 68 is not a substantive rule that can be used to strip a federal court of jurisdiction; it merely encourages settlement by shifting the burden to pay costs onto the plaintiff if an offer of settlement is greater than the relief obtained following a trial. *See, e.g.*, *McCauley*, 402 F.3d at 342; *see also* Fed. R. Civ. P. 68 advisory committee's note to 1949 amendment.

has held that federal courts retain jurisdiction over a class action even when a representative plaintiff's claims would otherwise be considered moot. *See Roper*, 445 U.S. at 343-44 (explaining that the offer of settlement without acceptance does not moot class claims to prevent plaintiffs from appealing adverse certification ruling); *Gerstein v. Pugh*, 420 U.S. at 110 n.11 (finding class claims were not rendered moot where case was capable of repetition but evading review); *Sosna v. Iowa*, 419 U.S. at 398 (holding that class certification relates back to date of original complaint where plaintiff's claim becomes moot after filing class certification ruling but before court rules). An unaccepted Rule 68 offer is not materially distinguishable from those cases.

This Court's recent decision in *Genesis Healthcare Corp. v. Symczyk* does not alter the analysis. 133 S. Ct. 1523, 1529, 1532 (2013). In *Genesis*, the issue of whether an unaccepted offer of judgment can moot a class or collective action was not before the Court. *Id.* at 1529-30. This Court held simply that *if* a plaintiff has no personal interest in the litigation, that case is moot even if the plaintiff seeks to bring a collective action. *Id.* at 1532. The Court also distinguished *Roper*, *Geraghty*, and cases like them by noting that "there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b)." *Id.* at 1529 n.1.

In sum, this Court's existing mootness jurisprudence supports Respondent's position.

CONCLUSION

At all stages of a class action, whether before or after certification, a representative plaintiff is required to uphold the interests of the absent class members above her own. A defendant's unaccepted Rule 68 offer should not be permitted to interfere with the operation of these core due process considerations. This is particularly true because Petitioner's reading of Rule 68 would effectively vitiate many of the efficiency considerations underlying Rule 23 in the first instance.

August 31, 2015

Respectfully submitted,

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